

Serial No.: 10/709,019  
Filing Date: April 7, 2004  
Group Art Unit: 3732  
Examiner: D. Bonderer  
Atty. Docket No.: 101896-245 (DEPS277)

### REMARKS

The present Office Action addresses claims 1-50, withdrawing claims 7, 14, 20-30, 34, 35, and 50, and rejecting remaining claims 1-6, 8-13, 15-19, 31-33, and 36-49.

#### *Election/Restriction Requirement*

In response to the previous election/restriction requirement, Applicants elected Species A, Figures 1-3B, Claims 7, 14, and 35 were therefore withdrawn from consideration as being drawn to a non-elected species.

At the outset, Applicants note that claim 45, which is similar to claim 7, should be withdrawn as being drawn to a non-elected species.

The Examiner has now determined that claims 20-30, 34, and 50 do not read upon the elected species. Applicants respectfully disagree, in part. Claims 22-30 read on the elected species and should not be withdrawn from consideration. In particular, claims 22 and 23 recite that the first and second transverse members can be positioned at an angle relative to one another. Claim 28 similarly recites that the connector member is angularly adjustable with respect to the central portion. As described at paragraph 0031, the cross-connector shown in Figures 1-3B has first and second transverse members that can be positioned at an angle relative to one another. Claim 24 recites a central locking mechanism, as shown in Figure 2B, that is coupled to the transverse members for locking them in a fixed position. Claims 25-27 are directed to a central clamp for locking the transverse members, and for receiving a central locking mechanism. Again, Figures 2B illustrates a clamp 20 for receiving a locking mechanism 22 for locking the transverse members together. Lastly, claims 29 and 30 are directed to a bend zone formed between the connector and the central portion. Figures 1A and 1B show bend zones 50 and 52 formed between the connector and the central portion. Accordingly, claims 22-30 read on the elected species, and therefore these claims should not be withdrawn from consideration, as suggested by the Examiner.

#### *Amendments to the Claims*

Claims 1 and 41 are amended to recite that at least one of the jaws is integrally formed with the central portion. Support for this amendment can be found throughout the specification and in the

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drawings. No new matter is added.

***Rejection Pursuant to 35 U.S.C. §112***

The Examiner rejects claim 45 pursuant to 35 U.S.C. §112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. In particular, the Examiner submits that the term "push" is used by the applicant in claim 45 to mean "pull." Applicants respectfully disagree. In certain embodiments, the locking mechanism is adapted to push, not pull, the second jaw toward the first jaw. For example, in the embodiment shown in Figures 4A and 4B, the locking mechanism (136) will push the second jaw (132) toward the first jaw (134). Figures 6A, 6B, and 7 also illustrate embodiments in which the locking mechanism will push the second jaw toward the first jaw. Accordingly, the term "push" is not used by the applicant to mean "pull." Reconsideration and withdrawal of this rejection is respectfully requested.

***Rejections Pursuant to 35 U.S.C. §102(e)***

Claims 1-6, 8-12, 18, 19, 31-32, and 36-49 are rejected pursuant to 35 U.S.C. §102(e) as being anticipated by U.S. Publication No. 2003/0114853 of Burgess. The Examiner argues that Burgess discloses a cross connector having a lockable central portion, a connector, first and second jaws, a locking mechanism that has a threaded and non-threaded portion, a central portion with two members that slide relative to one another, and surface features formed on the surface of the clamps to facilitate engaging of a rod.

***(1) Independent Claims 1 and 41***

Amended claims 1 and 41 recite a cross-connector having a central portion with at least one connector member that includes first and second opposed jaws. At least one of the first and second jaws is integrally formed with the central portion (claim 1) or connector (claim 41). Burgess does not teach or even suggest a cross-connector having a connector member in which at least one of the jaws is integrally formed with a central portion of the device. Rather, Burgess discloses cross-connectors having jaws that are formed from separate pieces and that move freely relative to the central portion. As shown in the drawings, neither jaw is integrally formed with the connector or

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central portion. Accordingly, independent claims 1 and 41, as well as claims 2-6, 8-12, 18, 19, 31-32, 36, and 42-49 which depend therefrom, distinguish over Burgess and represent allowable subject matter.

*(2) Independent Claim 37*

Independent claim 37 recites an implantable cross-connector having at least one connector member with first and second opposed jaws. The jaws are biased to an open position. Burgess does not teach or even suggest a cross-connector having jaws that are biased to an open position. As discussed above, in each embodiment the cross-connector includes jaws that are formed from two separate pieces. The jaws move freely relative to one another until a locking mechanism is applied thereto. Accordingly, the jaws are not biased to an open position. Claim 37, as well as claims 38-40 which depend therefrom, therefore distinguish over Burgess and represent allowable subject matter.

*Rejections Pursuant to 35 U.S.C. §103(a)*

Claims 13, 15-17, 47, and 48 are rejected pursuant to 35 U.S.C. §103(a) as being obvious over Burgess, and claim 33 is rejected pursuant to 35 U.S.C. §103(a) as being obvious over Burgess in view of U.S. Patent No. 5,980,523 of Jackson.

For the same reasons set forth above, independent claims 1, 37, and 41 distinguish over Burgess. Accordingly, claims 13, 15-17, 47, and 48 are allowable at least because they depend from an allowable base claim.

Applicants also note that Burgess, which is prior art under §102(e) and which is commonly assigned with the present application, may not be used to reject the claims of this application pursuant to 35 U.S.C. 103(a).

Subject matter which is developed by another person which qualifies as prior art only under 35 U.S.C. §102(e) . . . may be used as prior art under 35 U.S.C. §103 against a claimed inventor unless the entire rights to the subject matter and the claimed invention were . . . subject to an assignment to the same . . . organization at the time the claimed invention was made.

37 C.F.R. §1.104(c)(4). See also 35 U.S.C. §103(c). Both U.S. Publication No. 2003/0114853 to Burgess and the present application are assigned to DePuy Spine, Inc. (formerly DePuy Acromed,

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Inc.) of Raynham, Massachusetts. The assignment for the present application is recorded with the United States Patent and Trademark Office at Reel 014483, Frame 0783, and the assignment for Burgess is recorded with the United States Patent and Trademark Office at Reel 014193, Frame 0943. Burgess, therefore, can not be used as prior art under §103.

***Conclusion***

Applicants submit that all claims are now in condition for allowance, and allowance thereof is respectfully requested. Applicants encourage the Examiner to telephone the undersigned in the event that such communication might expedite prosecution of this matter.

Respectfully submitted,

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